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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 104

QUENTIN STROUD, ET AL.,
Petitioners,

v.

EZRA T. BENSON, SECRETARY OF AGRICULTURE, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

QUENTIN STROUD, AARON MURPHY, OMLE BLALOCK, FLOYD GRAY, Jr., LEON MURPHY, CARL WHALEY, STEDMAN WILSON, R. J. WILSON, ALDA SHARP, JAMES T. HEATH, ERNEST HEATH, GARDNER HOUSTON, ROLAND CUNNINGHAM, DEWEY JOYNER, JAMES C. WHALEY, TUNK BAKER, JASPER HOUSTON, ERNEST KENNEDY, LLOYD KENNEDY, MARVIN RHODES, E. L. McCOY, EXA HOUSTON, LESTER KENNEDY, JOHN IVY SMITH, WALTER HEATH, OWEN KENNEDY, BRANTLEY KENNEDY, H. C. BAKER, PAUL CARTER, W. A. GUY, ERNEST JONES, W. E. DAVIS, MATTHEW JENKINS, LEE GRIFFIN, NED KENNEDY, MARSHALL KENNEDY, LEONARD KENNEDY, CHESTER J. HOUSTON, S. V. MASSEY, JAMES A. KENNEDY, S. M. JONES, ODELL GRESHAM, VERNELL GRESHAM, G. P. RHODES, CLIFFORD WILLIAMS, NORMAN JONES, LEMON KORNEGAY, LESLIE SERMONS, J. FRED WILLIAMS, S. L. GRADY, G. W. COX, M. K. PORTER, C. P. STOKES, C. T. CARROW, JAMES J. MILLS, BRUCE M. EDWARDS, H. L. FORNES, Jr., L. E. HARDEE, W. L. LITTLE, C. E. GRAY, WESLEY R. ALLEN, FRED MILLS, Jr., GUY L. EVANS, FRED HADDOCK, RAYMOND COX, L. R. HARDEE, J. B. TUCKER, HUGH B. MILLS, H. L. CANNON, MRS. ALMA O. CHERRY, J. LONNIE TUCKER, MRS. ELLA PATE, MRS. FRED EDWARDS, L. B. TUCKER, ANDREW COGHILL, H. D. JOHNSON, ARDEN L. TUCKER and HUBERT C. SUTTON, *Petitioners*,

vs.

EZRA T. BENSON, Secretary of Agriculture of the United States of America, TILLMAN R. WALKER, W. E. MATTHEWS, ZENO RATCLIFF, Jr., and D. S. WEAVER, Agricultural Stabilization and Conservation Committee of the United States Department of Agriculture, H. D. GODFREY, Administrative Officer, Agricultural Stabilization and Conservation Committee, United States Department of Agriculture; FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION OF RALEIGH, NORTH CAROLINA;

[TITLE CONTINUED ON PAGE 2]

[TITLE CONTINUED FROM PAGE 1]

COMMODITY CREDIT CORPORATION; HORACE MEWBORN, Manager, Lenoir County Agricultural Stabilization and Conservation Office; NELSON R. BARKER, Manager, Jones County Agricultural Stabilization and Conservation Office; S. T. BROWN, Manager, Duplin County Agricultural Stabilization and Conservation Office; W. A. HARDY, Manager, Greene County Agricultural Stabilization and Conservation Office; J. C. LANE, Manager, Craven County Agricultural Stabilization and Conservation Office; and JAMES T. MEREDITH, Manager, Pitt County Agricultural Stabilization and Conservation Office,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners above named, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-captioned case on April 1, 1958.

Opinions Below

The opinion of the United States District Court for the Eastern District of North Carolina (R. 22), is reported in 155 F. Supp. 482.

The opinion of the Court of Appeals for the Fourth Circuit (App. p. 24), is unreported, and is appended. (R. Vol. IV, p. 24).

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on April 1, 1958, and copy thereof is appended to this Petition in the appendix, at pages 24-33.

The jurisdiction of this Court is invoked under 28 USCA, paragraph 1254(1).

Jurisdiction of United States District Court

(1) TITLE 7, U S C A, Sec. 1376: "The several district Courts of the United States are vested with jurisdiction specifically to enforce the provisions of this chapter".

(2) TITLE 7, U S C A, 608a(6):

"The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to Sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this Title in any proceeding now pending or hereafter brought in said courts".

(3) TITLE 28 U S C A, Section 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies".

Questions Presented

1. Does Chapter 21A (Tobacco Inspection Act) TITLE 7, USCA 511 et seq, empower the Secretary of Agriculture of the United States to identify tobacco, as that term is defined in the Act, (a) Upon a variety basis; and (b) by distinguishably different basket tickets upon the auction sale warehouse floor?

2. Does the Secretary of Agriculture of the United States have authority under Chapter 21B (Tobacco Control) TITLE 7, USCA 515 et seq, to adopt and enforce rules and regulations providing for the inspection of tobacco, known as flue-

cured tobacco, upon the farms of the producers and upon a variety basis?

3. Does TITLE 7, USCA 608b, et seq, vest the Secretary of Agriculture of the United States with authority to enforce the rules and regulations for the identification of flue-cured tobacco upon a variety basis, by distinguishably different basket tickets prior to its being offered for sale on the auction market, when said rules and regulations have not been approved by the producers of flue-cured tobacco pursuant to referendum provided for in the said Acts?

4. Is the Secretary of Agriculture of the United States required, under Sub-Chapter 1 (general provisions), TITLE 7, USCA, Sec. 1421, et seq., to support flue-cured tobacco at ninety per cent of parity to plaintiffs as compliance producers (c) Sec. 1421; (b) Sec. 1428; Sub-Chapter 2 (basic agricultural commodities (Sec. 1441(c)), as agreements between the producers and cooperators and the United States?

5. Are the contracts executed between the defendant, auction sale warehousemen and the defendant Stabilization Corporation, requiring the identification of flue-cured tobacco upon a variety basis by the auction sale warehouse operator and the placing of a white basket ticket upon tobacco identified as acceptable varieties, and all other tobacco offered for sale by a distinguishably different (striped) type of basket ticket, valid and enforcible?

6. Is the identification of flue-cured tobacco upon a variety basis upon the auction sale warehouse floor pursuant to the terms and provisions of the rules and regulations in question, including the placing of a striped ticket upon all tobacco offered for sale, except the "acceptable varieties" upon the auction sale warehouse floor prior to its being offered for sale, in violation of the Anti-trust laws of the United States, TITLE 15 USCA, Sections 1, 2, 13 and 14?

7. Are the defendants, Secretary of the United States Department of Agriculture and Commodity Credit Corporation, indispensable parties to the above-entitled action?

8. Are the plaintiffs entitled to the injunctive relief prayed for?

The District Court denied the relief and the Court of Appeals affirmed.

Statutes, Federal Rules and Regulations Involved

The pertinent portion of the statutes involved are as follows:

Chapter 21A—Tobacco Inspection; Sec. 511(f); 511(a), 511(b), 511(d); 511(e), 511(g), 511(i), (c); Chapter 21b, Sec. 515; Sec. 515(a); Chapter 26—Agricultural Adjustment Act; Sec. 602; Sec. 608a, (6); Sec. 608b, c; Sec. 611; Chapter 35, Sec. 1282; Sub-Chapter 2, Chapter 35; Sec. 1301(6)(A) (f) (15); Sec. 1313(b); Sec. 1314(a); Sec. 1340(10); Sec. 1375; Sec. 1376; Chapter 35A, Sub-Chapter 1—General Provisions; Sec. 1421; Sec. 1423; Sec. 1428(b) (c) (i); Sec. 1429; Sec. 1441(c); Sec. 464.901; 22 F. R. 4777; Sec. 464.906(a)-(c); 22 F. R. 4778; Sec. 464.908; 22 F. R. 4778; Sec. 464.910; 22 F. R. 4779.

Tobacco Marketing Quota Regulations of 1957-1958

Sec. 725.830; 22 F. R. 4065; Sec. 725.835(a)-(f), 22 F. R. 4066,67; Sec. 725.838(b),(d); 22 F. R., 4068; Sec. 725.839(b); 22 F. R. 4069; Sec. 725.852(b); 22 F. R. 4071.

COMMODITY CREDIT CORPORATION CHARTER ACT:

TITLE 15 USCA, Sec. 714, et seq.

ANTI-TRUST LAWS INVOLVED

TITLE 15 USCA, Sections 1, 2, 13 and 14.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

Statement

The plaintiffs instituted the above-entitled action in the United States District Court for the Eastern District of North Carolina, seeking to enjoin the placing of striped basket tickets upon their tobacco preliminary to its being offered for sale on the auction sale warehouse floors in the channels of interstate and foreign commerce, alleging that the rules and regulations adopted by the United States Department of Agriculture, through its several agencies, were illegal and void, not having been approved by the producers of tobacco in the manner prescribed by TITLE 7, USCA, Chapter 21A, Tobacco Inspection; 21B, Tobacco Control, and Chapter 608c, or by the Administrative Procedure Act, TITLE 5 USCA, Section 1001, et seq. (R. Vol. I, 1-17).

The plaintiffs allege that the rules and regulations under which their tobaccos were being identified upon a variety basis were adopted after the 1957 tobacco crop in the flue-cured bright leaf belt had matured, or practically matured, and amounted to the taking of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. (R. Vol. I, 11-12). They further allege that they are each within-quota producers of tobacco and are entitled to have their tobacco supported at ninety per cent of parity, and that the defendants were supporting their tobacco on the auction sale market at fifty percent of

parity, (R. Vol. I, 9-10). They further allege that the enforcement of the rules and regulations through which their tobacco was identified upon the auction sale floor through the use of striped basket tickets, removed the tobacco from auction sale, and was in violation of the Antitrust laws of the United States; TITLE 15 USCA, Sections 1, 2, 13 and 14. (R. Vol. I, 19-20).

They further allege that they were each suffering irreparable injury and damage to the extent of more than two-thirds of their respective 1957 crop of tobacco (R. Vol. I, 10-11); further alleging that the placing of striped basket tickets upon their tobacco preliminary to its being offered for sale on the auction sale warehouse floor removed the tobacco from auction sale and deprived them of a market for their tobacco. They further alleged that the damages sustained by them exceeded $500,000.00 (R. Vol. I, 18).

The plaintiffs offered evidence in support of their allegations. (R. Vol. I, 49-103).

At the beginning of the hearing before the United States District Court the defendants moved to dismiss for that:

(1) The Court lacked jurisdiction over the subject matter;

(2) The Court lacked jurisdiction over the person of Ezra T. Benson, Secretary of Agriculture;

(3) The venue as to the Secretary of Agriculture is improper;

(4) The Secretary of Agriculture is an indispensible party;

(5) The Complaint fails to state a claim on which relief can be granted.

The District Court overruled the motion and proceeded to consider the case on its merits. (R. Vol. I, 23).

The Court entered an order, "MEMORANDUM, FINDINGS OF FACT AND ORDER" (R. Vol. I, 22-45). Excerpts from the

rules and regulations of the United States Department of Agriculture were quoted. (R. Vol. I, 26-45), and in which it found as a fact "with regard to the identification order, no notice, hearing, or referendum was had which would comply either with the provisions of the Agricultural Marketing Agreement Act of 1937 (TITLE 7, USCA Sec. 601 et seq), or with the provisions of the Administrative Procedure Act, TITLE 7, USCA, Sec. 1001, et seq, if such provisions are applicable, as a matter of law, to the regulation in issue". (R. Vol. I, 30-31).

The Court further found as a fact that it was the duty of the Secretary of Agriculture to support tobacco at ninety per cent of parity. (R. Vol. I, 31). The Court further found as a fact that a substantial number of plaintiffs unknowingly planted flue-cured tobacco during the 1957 crop year "which has been determined to possess growth characteristics or seed strains of the 'discount' varietres". (R. Vol. I, 31).

The Court further found as a fact that the "tobacco buyers so far have not and are not placing any bids for tobacco offered for sale on any warehouse floor upon which a striped basket ticket appears". (R. Vol. I, 33); and further: "A substantial quantity of tobacco grown by plaintiffs during the present season would bring higher prices pound for pound if offered without the identification as 'discount' tobacco, for the reason that it is difficult to identify in some instances in the rush of the auction sales."

The Court held that the rules and regulations were valid under the Agricultural Act of 1949, TITLE 7 USCA, Sec. 1421 et seq.

The evidence offered by the defendants did not challenge the evidence of plaintiffs in support of their allegations concerning the irreparable damage they were suffering through the enforcement of the rules and regulations of the United States Department of Agriculture, through which

their tobacco was being identified upon a variety basis, by striped basket tickets on the auction sale market and at fifty per cent of parity.

On appeal, the Court of Appeals affirmed.

The Court of Appeals considered primarily the question of the duty of the Secretary of Agriculture to support plaintiffs' flue-cured tobacco at ninety per cent of parity, (R. pp. 25, 26). It gave a resume of the defendants' contentions relating to the full-bodied, full-flavored and aromatic characteristics of tobacco desired by the foreign trade, referring to the 1955-1956 market years during which the three varieties, Coker 139 and 140, and Dixie Bright 244, were grown, and that the 1956 crop consisted of fifty to sixty per cent of these varieties; and that 22.49 per cent was taken into the stabilization pool during 1956, and that the future of the industry was alarming. It also outlined the procedure through which the tobacco was identified upon a variety basis, and that through the enforcement of the regulations the 1957 season witnessed a dramatic restoration of confidence. It then gave consideration only to the question of jurisdiction of the Secretary of Agriculture, setting forth the principle—

> "If, broadly considered, the suit is in essence one against persons threatening the invasion of a private right, they may be enjoined. If they claim to be acting under an authority which the law does not recognize, the absence from the proceedings of the official whose unlawful orders they rely upon does not bar the action against them". (R. pp. 30-31)

The Court concluded that the Secretary and Commodity Credit Corporation were indispensable parties without deciding, except by inference, the question of the validity of the regulations which were the subject of attack in the case at bar. Its opinion appears to have been based in part at

least upon the premise that the suit would expend itself on the public treasury or domain, or interfere with public administration, (R. p. 32), concluding that "the Government's liability cannot be tried behind its back", and that the case should have been dismissed for jurisdictional grounds for want of a necessary party, holding "the order appealed from will accordingly be vacated, without any intimation, however, that the merits were not correctly decided by the District Judge, and that the case will be remanded with direction that it be dismissed for lack of jurisdiction.

Reason for Granting the Writ

The decision below should be reviewed because it erroneously failed to apply the facts to the law relating to the enforcement of rules and regulations affecting the production of flue-cured tobacco by within-quota producers under the terms and provisions of the Agricultural Tobacco Marketing Agreement Act of 1937,—TITLE 7, USCA, Sec. 601, et seq, as amended, including the amendment referred to as the Agricultural Act of 1949, TITLE 7, USCA, 1421 et seq. Section 608b of Chapter 26, TITLE 7, USCA, specifically provides:

> "The Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the Anti-trust laws of the United States, and any such agreement shall be deemed to be lawful:"

The decision of the Court of Appeals is in conflict with the decision in the case of *U. S.* v. *Rock Royal Co-op*, 307 U. S. 533, in which the Court held that "Section 8B authorizes the Secretary of Agriculture to enter into marketing agreements with producers and others engaged in the handling of agricultural commodities or in affecting interstate commerce"; and further, "they are to be entered only when the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of the Act with respect to any commodity or product thereof, and after notice and an opportunity for hearing. It is necessary also for the Secretary of Agriculture to set forth in such order a finding upon the evidence introduced at the hearing, that the issuance of the order and of the terms and conditions thereof, will tend to effectuate the declared policy * * * *." Orders may only be issued after hearing upon a marketing agreement which regulates the handling of the commodity in the same manner as the order.

The Court, further considering the failure of handlers under the Act to sign a marketing agreement, and the authority of the Secretary of Agriculture to act, states:

> "In such a case (failure of handlers to sign) the order must be approved or favored by two-thirds of the producers in number or volume who have been engaged, during a representative period, in the production for market of the commodity * * *".

The same principle is upheld in the case of *Parker* v. *Brown*, 317 U. S., 341.

The record shows that 416 farmers were affected adversely by the enforcement of the rules and regulations of the Department of Agriculture, which are obviously void as being contrary to the Agricultural Adjustment Act, and the decisions of the United States Supreme Court, interpreting same, and also an invasion of the constitutional

rights of the plaintiffs in respect to the production of flue-cured tobacco and the marketing of same in the stream of interstate and foreign commerce.

The questions presented in this case are of great and recurring significance in the administration of the Crop Control Program by the United States Department of Agriculture.

It is stated in the brief of the defendant, Stabilization Corporation, that it is the purpose of the defendants to enforce similar regulations during the 1958-59 tobacco year, which are likely to be fraught with similar problems of enforcement and comparable irreparable loss to the producers.

The plaintiffs are entitled to the relief prayed for without the presence in the suit of either the Secretary of Agriculture or Commodity Credit Corporation. The agencies through which the void rules and regulations have been and are being enforced are before the Court. The serious questions involved and the effect of the decision below, if unreversed, will materially affect the agricultural program to the detriment of the public interest, and the Court should at least exercise its discretionary jurisdiction and grant this Petition.

Conclusion

For the reasons set forth, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

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PERTINENT EXCERPTS FROM THE STATUTES INVOLVED

CHAPTER 21A.—TOBACCO INSPECTION, Sec. 511(f):

"Tobacco" means tobacco in its unmanufactured form".

Sec. 511a. Declaration of Purpose:

"Transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in price, and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein".

Section 511b. Official standards for classification; tentative standards; modification

"The Secretary is authorized to investigate the sorting, handling, conditioning, inspection, and marketing of tobacco from time to time, and to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States, and shall become effective immediately or upon a date specified by the Secretary: Provided, That the Secretary may issue tentative standards for tobacco prior to the establishment of official standards therefor, and he may modify any standards established under authority of this chapter whenever, in his judgment, such action is advisable".

Section 511g. Placing of grade on warehouse tickets, etc.; form

"Warehousemen shall provide space on warehouse tickets or other tags or labels used by them for showing the grade of the lot covered thereby as determined by an authorized tobacco inspector under this chapter. The Secretary may prescribe, by regulation, the form in which such certification of grade shall be shown, and may require that a copy of such warehouse ticket, tag, or label shall be furnished to the Secretary".

Section 511i(c) (Offenses)

"For any person, not an authorized inspector under this chapter, to issue a certificate or report stating the type, grade, size, or condition of any lot of tobacco to be in accordance with the standards of the United States therefor which is of such color, size, arrangement, or wording as to be mistaken for a certificate issued under this chapter, unless such certificate states in prominent letters in its heading that it is not issued under authority of the United States".

CHAPTER 21B. U S C A—TOBACCO CONTROL

Section 515 * * * limitation on consent:

"That nothing in said sections shall be construed to grant the consent of Congress to negotiate any compact for regulating or controlling the production of, or commerce in, tobacco for the purpose of fixing the price thereof, or to create or perpetuate monopoly, or to promote regimentation, but such consent shall be limited to compacts for the regulation and control of production of, or commerce in, tobacco in order thereby to enable growers to receive a fair price for such tobacco".

Sec. 515a. Definitions:

"'Kind of tobacco' means one or more types of tobacco as classified in Service and Regulatory Announcement Numbered 118 of the Bureau of Agricultural Economics of the

United States Department of Agriculture as listed below according to the name or names by which known:

Types 11, 12, 13, and 14, known as flue-cured tobacco".

CHAPTER 26, U S C A—AGRICULTURAL ADJUSTMENT ACT

Sec. 602(1)—Declaration of Policy, etc.:

"Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a) (1) of this title".

Sec. 608b. Marketing agreements; exemptions from anti-trust laws:

"In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be unlawful:"

Sec. 608c. (1) Orders regulating handling of commodity —issuance by Secretary:

"The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-

608, 608a, 608b, 608c, 608d, 612, 613, 614-619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate in the manner hereinafter in this section provided only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof".

Sec. 608(3)—Notice and hearing

"Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order".

Sec. 608(4)—Finding and issuance of order

"After such notice and opportunity for hearing the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity".

Sec. 608c (8)—Orders with marketing agreement

"—no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations or producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such

order,'"*—"Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored: (A) By at least two-thirds of the producers who * * * during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or (B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order."

Orders with or without marketing agreement

"(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers * * * of more than 50 per centum of the volume of the commodity or product thereof * * * covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, determines: (A) That the refusal or failure to sign a marketing agreement * * * by the handlers * * * of more than 50 per centum of the volume of the commodity or product thereof * * * specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity or product, and (B) That the issuance of such order is the

only practical means of advancing the interest of the producers of such commodity pursuant to the declared policy and is approved or favored: (i) By at least two-thirds of the producers * * * who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or (ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order."

"Manner of regulation and applicability

"No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held."

CHAPTER 35 U S C A:

Sec. 1282.—Declaration of policy

"It is declared to be the policy of Congress to continue the Soil Conservation and Domestic Allotment Act, as amended, for the purpose of conserving national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch land resources in the national public interest; to accomplish these purposes through the encouragement of soil building and soil conserving crops and practices; to assist in the marketing of agricultural commodities for do-

mestic consumption and for export; and to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodity in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices."

SUB CHAPTER II; CHAPTER 35 U S C A—

"(6) (A)" 'Market' in the case of * * * tobacco * * * means to dispose of, in raw or processed form, by voluntary or involuntary sale, barter, or exchange, or by gift inter vivos, * * * (7) " 'Marketing year' means, in the case of the following commodities, the period beginning on the first and ending with the second date specified: * * * tobacco (flue-cured), July 1-June 30;"

(Sec. 1301(13) " 'Tobacco' means each one of the kinds of tobacco listed below comprising the types specified as classified in Service and Regulatory Announcement Numbered 118 of the Bureau of Agricultural Economics of the Department: Flue-cured tobacco, comprising types 11, 12, 13, and 14;"

CHAPTER 35 U S C A, Sec. 1340 (10)

"The Commodity Credit Corporation is directed to make available upon the 1941, 1942, 1943, 1944, 1945 and 1946 crops of the commodities cotton, corn, wheat, rice, tobacco and peanuts, for which producers have not disapproved marketing quotas for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:"

Sec. 1375—Regulations

"(a) The Secretary shall provide by regulations for the identification, wherever necessary, of corn, wheat, cotton, rice, peanuts, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are

subject to and such amounts thereof as are not subject to marketing restrictions in effect under this chapter.
(b) The Secretary shall prescribe such regulations as are necessary for the enforcement of this chapter."

CHAPTER 35A, U S C A—Sec. 1421

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.
(c) Compliance by the producer with acreage allotments, production goals and marketing practices (including marketing quotas when authorized by law), prescribed by the Secretary, may be required as a condition of eligibility for price support."

Sec. 1423—Adjustment of Support Prices

"Appropriate adjustments may be made in the support price for any commodity for differences in grade, type, staple, quality, location, and other factors. Such adjustments shall, so far as practicable, be made in such manner that the average support price for such commodity will, on the basis of the anticipated incidence of such factors, be equal to the level of support determined as provided in this Act. Middling seven-eights inch cotton shall be the standard grade for purposes of parity and price support."

Sec. 1428—Determinations of Secretary as final and conclusive

"Determinations made by the Secretary under this Act shall be final and conclusive: Provided, That the scope and nature of such determination shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act."

SUB-CHAPTER II, CHAPTER 35A, U S C A:

Sec. 1441—Price Support Levels

"The Secretary of Agriculture (hereinafter called the 'Secretary') is authorized and directed to make available through loans, purchases, or other operations, price sup-

port to cooperators for any crop of any basic agricultural commodity, if producers have not disapproved marketing quotas for such crop, at a level not in excess of 90 per centum of the parity price of the commodity nor less than the level provided in subsections (a), (b), and (c) of this section as follows:"

"(c) For tobacco, if marketing quotas are in effect, the level of support shall be 90 per centum of the parity price."

TITLE 15, U S C A, Sec. 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: Provided, that nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title:"

SEC. 2.—Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Sec. 13.

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purposes of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:"

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Sec. 14. Sale, etc., on agreement to use goods of competitor

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any territory thereof, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such

condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

CONSTITUTION OF THE UNITED STATES—FIFTH AMENDMENT * * * *

"nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation".

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7553

QUENTIN STROUD, ET AL., APPELLANTS,

versus

EZRA T. BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, ET AL., APPELLEES.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern.

(Argued January 17, 1958 Decided April 4, 1958.)

Before PARKER, Chief Judge, and SOPER and SOBELOFF, Circuit Judges.

Jesse A. Jones (Jones, Reed & Griffin, and M. E. Cavendish on brief) for Appellants; Samuel D. Slade, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney General; Julian T. Gaskill, United States Attorney, and Lionel Kestenbaum, Attorney, Department of Justice, on brief) for Appellee, Ezra T. Benson, Secretary of Agriculture, and William T. Joyner, for Appellee, Flue-cured Tobacco Cooperative Stabilization Corporation.

SOBELOFF, Circuit Judge:

A number of tobacco farmers instituted suit in the United States District Court for the Eastern District of North Carolina against the Secretary of Agriculture and others to contest the validity of provisions of the 1957 tobacco price support program which required certain varieties of tobacco, known as "discount varieties," to be identified as such when offered for sale on auction warehouse floors. The plaintiffs complained of arbitrary, unauthorized and illegal discrimination against these varieties and sought a declaration of invalidity, an injunction against the enforcement of the Secretary's rules and regulations complained of, and the termination of arrangements made for their implementation and enforcement.

In addition to the injunction against the regulations for identification of flue-cured[1] tobacco upon a variety basis, particularly by the issuance of different colored marketing cards and distinctive warehouse basket tickets, the plaintiffs sought that the Secretary and his co-defendants be "directed to support plaintiffs' flue-cured tobacco at 90% of parity." One of these other defendants is the Commodity Credit Corporation, a wholly owned corporate agency of the United States, through which the Secretary is authorized and empowered to provide funds for price support. This defendant is by statute immune from the injunctive process. 15 U. S. C. A., Sec. 714b(c). Loans are made by the Corporation as agent of the Secretary to another defendant, the Flue-Cured Tobacco Cooperative Stabilization Corporation of Raleigh, North Carolina, which is chartered under the State laws of North Carolina. The individual defendants, all North Carolinians, are those who constitute the Agricultural Stabilization and Conservation Committee of the United States Department of Agriculture for the State of North Carolina, and its administrative officer, or are managers of several County Agricultural Stabilization offices. These perform purely administrative duties in the execution of the regulations.

The background and development of the 1957 tobacco loan program, including the provisions under attack, may be briefly summarized. American produced flue-cured tobacco had for many years consistently commanded premium prices, especially from foreign buyers, because of its recognized "full-bodied," "full-flavored" and "aromatic" characteristics. As much as one-third to one-half of this country's production entered the export trade notwithstanding that lighter-bodied tobacco, deficient in the sought

[1] Jahn, Tobacco Dictionary (1954), p. 68:

"*Flue-cured tobacco*

"Tobacco cured in barns formerly heated by means of flues circulating the heat and carrying the smoke away. Flue-cured types, frequently spoken of as Bright Tobacco, are extensively grown in Virginia, northern and eastern North Carolina, eastern South Carolina, southeastern Georgia, and northern Florida. Flue-cured leaf is used in the manufacture of cigarettes and smoking and chewing tobaccos and for export."

after flavors and aromas, were available to foreign buyers at 50% or 80% of the cost of the American standard varieties.

In 1955 and 1956 the market was seriously disrupted by the appearance of three new varieties, known as Coker 139 and 140, and Dixie Bright 244. They were undesirable because wanting in the characteristics which distinguished American tobaccos. Tobacco known to be of these varieties brings much less than the established varieties. Yet they resembled the regular stock in appearance and could not be identified in cured leaf form when offered on the auction sale warehouse floors. Only after purchase was the deficiency discoverable, too late to give protection to the purchaser. The effect was loss of confidence in the tobacco offered at the auctions, and depressed prices for tobacco generally, because customers hesitated to pay full prices for an article liable to be of short quality.

Complaints from foreign and domestic buyers were numerous and persistent. The new varieties were definitely not wanted in the market but they offered one advantage to the grower; they were resistant to black shank and wilt and more pounds could be raised per acre of these than of the traditional varieties. A force that may be likened to Gresham's Law in finance was operating in the tobacco market to drive out the highly prized and higher priced varieties. The "discount" varieties were fast taking over. In 1956 as much as 50 to 60% of the tobacco planted was of this new category. As Judge Gilliam, in the District Court, found, the result was to visit a penalty on all producers of the desirable, and more valuable, standard American varieties, and 22.49% of the 1956 crop went into the stabilization pool under price supports. Another such season, the District Judge found, "would be disastrous, perhaps fatal, to the price support program."

The prospects for the future of the industry were indeed alarming. The Department of Agriculture counseled with scientists in agricultural colleges and experimental stations, representatives of the tobacco growing states and many persons engaged in all branches of the tobacco business, including growers. A plan was recommended almost unani-

mously for the identification of the objectionable varieties, by inspections during growth, and by laboratory examination of samples taken in the field. Only the breeder of the 139 and 140 seed and his chemist, and two other persons dissented. They favored a continuance of the grading methods which had prevailed before the discount varieties came upon the scene—methods which in recent experience had proved inadequate to the need.

The 1957 tobacco price support program adopted by the Secretary of Agriculture embodied the new features. As early as December 18, 1956, the Department announced that changes would be made in the 1957 flue-cured tobacco price support program to discourage production of varieties 139, 140 and 244, irrespective of grade, by supporting these varieties at one-half the support rates for others. It was also made known that support rates would be adjusted to reflect current demand patterns and to encourage cultural practices favoring increase in the proportion of the crop which has desirable flavor and aroma characteristics. Further announcements came in the winter and spring; one notice was mailed to each flue-cured producer about mid-January.

While the precise implementation of the plan for distinguishing varieties by use of different basket tickets was not made known before the beginning of the planting season, it was early declared and repeated that one condition of eligibility for full participation in price support benefits would be proof of the variety. As finally formulated the plan provided for varieties to be established by government inspection, photographs of the growing plants, laboratory examination of samples, as well as information from the farmers. The initial determination was to be made by the County Committee, consisting of farmers, subject to the grower's right to demand reconsideration by the Committee, and examination by variety-identification specialists other than those who previously examined the tobacco being grown on his farm.

On the auction warehouse sale floor the acceptable varieties were put in baskets bearing white marketing cards; the others in baskets bearing a distinguishable card

with two stripes printed thereon, and the latter tobaccos, under the plan, received one-half the support to which the others were entitled. The Secretary adopted the 50% fraction, because, according to his findings, it represented the average ratio of the worth of the discount varieties to the worth of regular varieties.

The effect of the plan was swift and impressive. Farmers readily conformed and bidders had the desired assurance that there was no danger of an admixture of unwanted varieties with the standard varieties. There came a sharp and radical reversal; instead of an estimated 50 to 60%, as in 1956, less than 2% of the farmers grew "discount varieties" in 1957. Instead of nearly one-fourth of the crop (22.49%) entering the stabilization pool, as in 1956, the 1957 season witnessed a dramatic restoration of confidence and wholesomeness in the market, and it is estimated that only three to four per cent of the crop had to enter the pool.

Motions to dismiss on jurisdictional grounds were interposed which, according to the opinion filed by the District Judge, he denied, despite doubts, in the belief that it would be in the public interest to decide the case on the merits. In a full and careful opinion he sustained the challenged regulations and procedures against every attack. The jurisdictional question, however, claims our attention and we are bound to deal with it despite the failure of the Secretary to cross appeal. *United States* v. *American Ry. Express Co.*, 265 U. S. 425 (1924); *Langnes* v. *Green*, 282 U. S. 531, 535 (1931); *Jaffke* v. *Dunham*, 352 U. S. 280 (1957).

We have recited the facts in detail sufficient to give an understanding of the nature of the case and the motion to dismiss.

In the case of the Secretary the answer to the jurisdictional question is clear. As his official residence is in the District of Columbia, only there may he be sued. *Butterworth* v. *Hill*, 114 U. S. 128 (1885); *Blackmar* v. *Guerre*, 342 U. S. 512 (1952); *Krug* v. *Fox*, 161 F. 2d 1013 (4 cir., 1947); *Berlinsky* v. *Woods*, 178 F. 2d 265 (4 cir., 1949); *Hunter* v. *United States*, 183 F. 2d 446 (4 cir., 1950).

But is the Secretary an indispensable party, without whom the litigation may not proceed against the remaining defendants? The decided cases do not seem at first glance to follow a consistent course, due largely to differences in the factual context in which the legal question arose; but the principle to be deduced is that one must look to the nature and effect of the proceeding and not merely to the names of titular parties. *Ex Parte State of New York, No. 1*, 256 U. S. 490, 500, (1921); *Land* v. *Dollar*, 330 U. S. 731 (1947). (If, broadly considered, the suit is in essence one against persons threatening the invasion of a private right, they may be enjoined. If they claim to be acting under an authority which the law does not recognize, the absence from the proceedings of the official whose unlawful orders they rely upon does not bar the action against them.) The rule was applied by this Court in *Ferris* v. *Wilbur*, 27 F. 2d 262, 264 (4 cir., 1928) in an opinion by Judge Parker:

> "Where the act complained of is not authorized by statute, or where the statute authorizing it is void because in conflict with some provision of the Constitution, the person attempting it may be restrained in a proper case, notwithstanding his claim that he is acting in his official capacity. In such case he is acting, not within the law, but outside it, his act is not the act of the government, and the law affords him no protection for what he is doing or is about to do. This is true, whether he be the head of a department or merely a subordinate acting under orders; and, if a subordinate, there is no necessity of joining as defendant the head of the department because the orders of the head are immaterial if the act sought to be enjoined is not authorized by law."

The decision follows the rule of *Colorado* v. *Toll*, 268 U. S. 228 (1925), where it was sought to enjoin the superintendent of a national park from exercising control over traffic therein. His right to do so was attacked by the State of Colorado on the ground that it had not ceded jurisdiction to the United States. The Supreme Court held that he could be proceeded against in a federal court, to restrain

him as an individual, without joining his superior officers. See also: *United States* v. *Lee*, 106 U. S. 196 (1882); *Goltra* v. *Weeks*, 271 U. S. 536 (1926).

Equally certain and confirmed by authority is the rule that if the judgment or decree granting the relief sought will require the superior officer to take action, either directly or through a subordinate, he is an indispensable party. Precisely in point is *Berlinsky* v. *Woods*, 178 F. 2d 265, 266 (4 cir., 1949), where Judge Soper said, "since . . . the purpose of the suit is to require [the Housing Expeditor] to take action in the exercise of his statuory powers, he is an indispensable party to the suit which cannot go on without him; and the case must therefore be dismissed as to the Area Rent Director and the Sheriff of Baltimore City."

Where the purpose of the suit against a subordinate was in reality to control the action of the Secretary of the Interior, the Secretary was held indispensable. *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28 (1897); and so also where the plaintiff demanded a more liberal permit than the defendant had power to grant under his delegated authority, the superior was ruled indispensable. *Guerich* v. *Rutter*, 265 U. S. 388 (1924). See also, *Webster* v. *Fall*, 266 U. S. 507 (1925); *Yarnell* v. *Hillsborough Parking Co.*, 70 F. 2d 435 (5 cir., 1934); *James* v. *Lake Wales Citrus Growers Asso.*, 110 F. 2d 653 (5 cir., 1940).

Especially is this rule applied where the judgment awarded would "expend itself on the public treasury or domain, or interfere with public administration." *Land* v. *Dollar*, 330 U. S. 731, 738 (1947). See also, *Williams* v. *Fanning*, 332 U. S. 490 (1947).

Here plaintiffs demand a doubling of their price support payments which can come only from moneys supplied by the United States. Such a case cannot be prosecuted without making the United States or the Secretary a party. We are dealing here with public money, not as in *Stark* v. *Wickard*, 321 U. S. 288, 305 (1944), with producers' money. It does not matter if the approach is indirect; the thrust of the suit which names others is in actuality against the Secretary and his administrative regulations. The impact would be on funds he administers by authority of

Congress. To borrow Justice Black's expression, "the Government's liability cannot be tried 'behind its back.'" See: *Mine Safety Co. v. Forrestal*, 326 U. S. 371, 375 (1945).

We have given consideration to the possibility that even apart from the prayer for a mandatory injunction for the payment of full price support, the plaintiffs might press their prayer for injunction against the marking of the baskets to distinguish varieties of tobacco. Our conclusion is against the suggestion. The marking of the baskets is only an administrative detail in the execution of the Secretary's regulations and cannot be adjudicated separately. The effect would be to nullify the regulations, because a restoration of the chaotic conditions of 1955-1956 would enlarge the volume of tobacco entering the stabilization pool and increase the burden on the public funds.

We are of the opinion that for want of a necessary party the motion to dismiss should have been granted on jurisdictional grounds. The order appealed from will accordingly be vacated, without any intimation, however, that the merits were not correctly decided by the District Judge, and the case will be remanded with direction that it be dismissed for lack of jurisdiction.

Vacated and Remanded with Direction to Dismiss Action.

(Judge Parker, who concurred in this opinion, died before its announcement.)

JUDGMENT

Filed and Entered April 1, 1958

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7555.

QUENTIN STROUD, ET AL., APPELLANTS,

vs.

EZRA T. BENSON, Secretary of Agriculture of the United States of America, TILMAN R. WALKER, W. E. MATTHEWS, ZENO RATCLIFF, JR. and D. S. WEAVER, Agricultural Stabilization and Conservation Committee of the United States Department of Agriculture; H. D. GODFREY, Administrative Officer; Flue-Cured Tobacco Cooperative Stabilization Corporation of Raleigh, North Carolina; Commodity Credit Corporation; HORACE NEWBORN, Manager, Lenoir County Agricultural Stabilization and Conservation Office; NELSON R. BARKER, Manager, Jones County Agricultural Stabilization and Conservation Office; S. T. BROWN, Manager, Duplin County Agricultural Stabilization and Conservation Office; et al., APPELLEES.

APPEAL FROM the United States District Court for the Eastern District of North Carolina

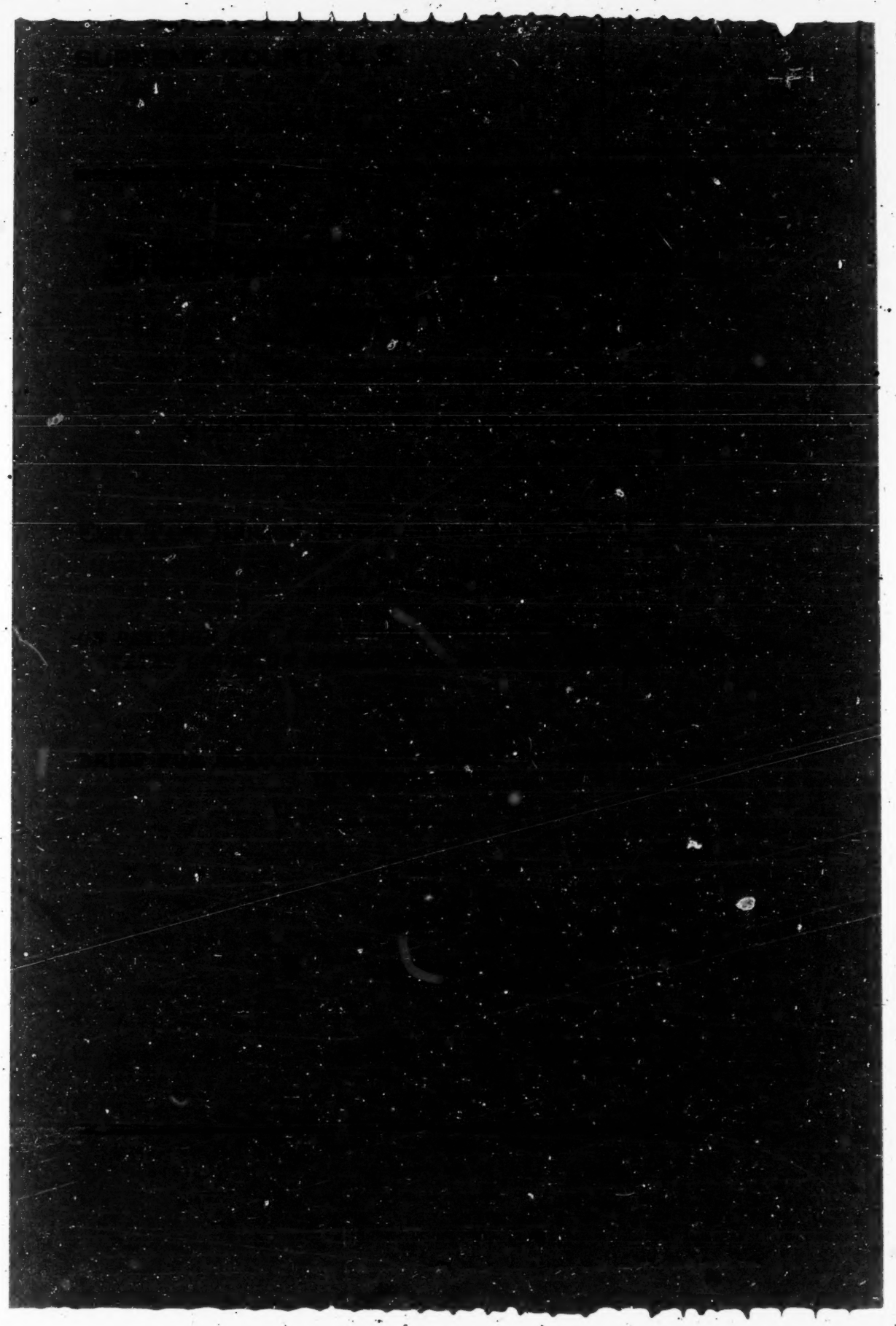
THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, vacated, without any intimation, however, that the merits were not correctly decided by the District Judge; and that this cause be, and the same is hereby,

remanded to the United States District Court for the Eastern District of North Carolina, at New Bern, with direction that it be dismissed for lack of jurisdiction, in accordance with the opinion of the Court filed herein.

SIMON E. SOBELOFF,
United States Circuit Judge.
MORRIS A. SOPER,
United States Circuit Judge.

(653-6)



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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 104

QUENTIN STROUD, ET AL., PETITIONERS

v.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT SECRETARY OF AGRICULTURE, IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. C.A. App. 22-45)[1] is reported at 155 F. Supp. 482. The opinion of the court of appeals (Pet. App. 24-31) is reported at 254 F. 2d 448.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1958. The petition for a writ of certiorari

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[1] "Pet. C.A. App." designates petitioners' appendix in the court of appeals, "Pet. App." their appendix to the petition for a writ of certiorari. Respondents' appendix in the court of appeals is cited "Resp. App."

was filed on June 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court was without jurisdiction to entertain this action on the ground that it lacked jurisdiction over the Secretary of Agriculture, an indispensable party.

2. Whether, under the Agricultural Act of 1949, the Secretary of Agriculture had the power to reduce the support price level applicable to three varieties of flue-cured tobacco, and to provide for their identification, when he determined that these varieties were undesirable and that their increasing production would threaten the stability of the industry and the price support program.

STATUTES INVOLVED

The pertinent provisions of the Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U.S.C. 1421, *et seq.*, are set forth in the Appendix, *infra*, pp. 23-24.

STATEMENT

Petitioners are seventy-eight North Carolina tobacco producers who, last year, grew in their fields varieties of tobacco known as Coker 139, Coker 140 and Dixie Bright 244. They brought this action to challenge provisions of the 1957 tobacco price support program which established price support for these varieties at 50 percent of the support level for comparable grades of standard varieties of tobacco, and which provided a program for identification of tobaccos belonging to these varieties in the production stage and up to their sale on the warehouse floor. Special blue "limited sup-

port" marketing cards were issued to farmers producing the so-called "discount varieties"; and tobacco brought for sale on a blue card was identified at the auction warehouse by the use of special striped basket tickets.

Petitioners alleged that they grew their crop in good faith, from seed which had been represented to them as not containing the discount varieties (Pet. C.A. App. 12). They complained that the identification of their product removed it "from competitive bidding on the auction market" and compelled them to dispose of it for the 50 percent support price, allegedly less than one-third its actual cash value (Pet. C.A. App. 10-11). They charged that the discrimination between varieties was arbitrary and unauthorized by law (Pet. C.A. App. 8); that it was improperly established without notice, hearing or referendum (Pet. C.A. App. 8-9); that, in any event, it was not possible to determine varieties with accuracy (Pet. C.A. App. 13); and that contracts which implement the program violated the anti-trust laws (Pet. C.A. App. 19-20).

In their prayer for relief, petitioners sought a judgment declaring invalid the rules and regulations of the Secretary of Agriculture for inspection of tobacco, classification of discount varieties, issuance of special marketing cards and use of distinctive warehouse tickets; an order directing the Secretary, through co-defendants and others, to support petitioners' tobacco at 90 percent of parity and to discontinue enforcement of the invalid rules and regulations; and the recovery of damages (Pet. C.A. App. 15-16).

A. *The 1957 Tobacco Loan Program and Variety Identification.* While flue-cured tobacco is also grown

in a number of other countries, the United States' product is prized for its outstanding flavor and aroma and fetches from 25 percent to more than 100 percent above prices paid for the competing products of other countries (Resp. App. 15-16, 35-36, 45, 135). Normally, from one-third to one-half of the American flue-cured crop goes into the export trade; this constitutes 60 percent of the world's flue-cured export (Resp. App. 20-44, 133).

In 1955 and 1956, however, there were increasing complaints from domestic and foreign buyers that tobaccos purchased here lacked the customary, and desired, flavor and aroma. Representatives of the Department of Agriculture and of the trade heard repeated criticism of the quality of the American crop, and buyers reported instructions to avoid inferior tobacco, cancellation of orders, and, on at least one occasion, return of an export shipment (Resp. App. 17-20, 24-26, 41-42, 45, 69, 71-74, 82, 134, 137). These complaints were directed at three new varieties of tobacco being grown in the United States—Coker 139, Coker 140 and Dixie Bright 244 (Resp. App. 17, 74, 134). A variety evaluation committee convened by the Department of Agriculture in late 1956, and composed of leading tobacco scientists from colleges and experimental stations, designated these three varieties as "low to lacking in flavor and aroma, generally of light body, and/or currently with poor acceptance in the trade" (Resp. App. 76-77).

Despite these reactions, Coker 139, Coker 140 and Dixie Bright 244 increased from about 20 percent of the 1955 crop to 50-60 percent in 1956 (Resp. App. 68,

70).[2] In the auction warehouse, and at the rapid pace of auction sales (a basket every nine seconds), it was almost impossible for buyers to distinguish these undesirable varieties from the standard flue-cured tobaccos (Resp. App. 23, 43, 47, 136, 179, 192, 215, 221-222). Only later in their factories and essentially by smoking tests, did the purchasers discover the absence of the flavor and aroma (Resp. App. 29-31, 63-64, 135-137, 142-143). Increasing attempts by purchasers to avoid the undesirable varieties caused a hesitant caution in the 1956 markets and depressed prices (Resp. App. 25, 42, 138, 214-216, 221). As a result, the Stabilization Corporation took 320 million pounds, 22.49 percent of the 1956 crop, under price support (Pet. C.A. App. 34; Resp. App. 42, 70, 217).

As the district court here concluded, a repetition of the 1956 season would have been "disastrous, perhaps fatal, to the price support program" (Pet. C.A. App. 34; Resp. App. 97, 217-218). Unless action were taken, it was feared that 80 percent or more of the 1957 crop would have been in the discount varieties (Resp. App. 38, 54-55, 97). The resulting switch of foreign buyers to other sources of neutral tobacco would have meant the substantial loss of our export market within a few years, observers warned (Resp. App. 16, 19, 55, 137-138, 139).

Accordingly, in December 1956, the Department proposed to discourage the production of the three so-

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[2] Coker 139 and 140 came into substantial use in 1955, Dixie Bright 244 in 1956 (Resp. App. 223, 42). Their popularity was due to their resistance to disease and the high yield per acre (Resp. App. 76-77, 114-115, 129, 218). As one expert testified, "If it [Coker 139 and 140] had had flavor and aroma it was the answer to the growers' prayer" (Resp. App. 218).

called discount varieties by lowering their support price to one-half that of the standard varieties, a suggestion which obtained the almost unanimous approval of leaders of all branches of the tobacco trade.[3] Only Mr. Coker, the breeder of 139 and 140, his chemist, and two other persons from South Carolina opposed (Resp. App. 22, 77, 218). The contemplated reduction was officially announced by the Secretary on December 18, 1956 (Resp. App. 78; Exh. P-4), and notification was mailed to each flue-cured producer in the United States by about mid-January (Resp. App. 78, 207-208; Exh. D-8).

The Secretary's official announcement in December 1956 stated that, as a condition to eligibility and price support, growers would have to establish whether they grow any of the discount varieties (Exhs. P-4, D-8). The Department's plan to identify the tobacco in the field, and to issue special blue "limited support" marketing cards to designate crops of discount tobacco, was announced early in January 1957 (See Exh. P-5), was published as Proposed Rule Making in May (Par.

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[3] This followed an unsuccessful attempt to cope with the problem during the 1956 season through the machinery for grading tobacco by appearance and texture under the Tobacco Inspection Act, 7 U.S.C. 511, *et seq.* Nine additional grades were established to segregate the high color and pale, slick appearance thought to characterize the undesirable tobaccos; these were given 10 cents per pound less price support than the comparable previous grades (Resp. App. 69-70, 115-116, 130).

This attempt failed because, first, the 1956 production of discount tobaccos was so large that the graders could not make the necessary distinctions. (Resp. App. 70, 78.) Second, it became evident that discount tobacco could be produced with the appearance of standard tobacco and be indistinguishable under the Inspection Act standards (Resp. App. 74, 78). It was therefore necessary directly to designate these tobaccos by variety and to devise appropriate tests to identify them.

3, 22 F.R. 3201-3202) and adopted in detail in June 1957, as part of the 1957-1958 Tobacco Marketing Quota Regulations (Sections 725.835(f), 725.838(b)-(d), 725.852(b), 22 F.R. 4066-4068, 4071). The terms of the 1957 Tobacco Loan Program published on July 9, 1957, prescribed support of the discount varieties at one-half the rate for comparable grades of other varieties; the use of blue "limited support" marketing cards; and identification at the warehouse auction "by a distinguishably different type of basket ticket." 22 F.R. at 4777-4779. Tobacco auction warehouses were required by their contracts with the Flue-Cured Tobacco Cooperative Stabilization Corporation, which advances price supports, to place striped tickets upon baskets of tobacco sold on a blue marketing card and to offer the lower price support for such tobacco (Secs. 464.901, 464.910 of 1957 Tobacco Loan Program; 22 F.R. at 4777, 4779; Exhs. P-1, P-2; Resp. App. 227-229).

The actual identification of the discount varieties was based upon two facts. First, these varieties have distinguishable physical characteristics in the growing stage which makes it possible for a trained observer to identify them accurately in the field (Resp. App. 47, 48, 83-84, 86-87, 172-173, 176, 181, 187-189, 195, 221-222; Exh. P-15). Second, under similar conditions of soil, cultural practice and weather conditions, the discount varieties, as a genetic characteristic, have only about one-half the nicotine content of the standard varieties, a difference which can be measured in chemical tests (Resp. App. 1-4, 48, 87-88, 146-147, 150-151, 156, 163-164, 167; Pet. C.A. App. 81). Field and laboratory tests were conducted and from the results it was deter-

mined whether the particular grower would get a regular white marketing card, entitling him to the full support price, or a blue limited support card (Resp. App. 85, 163-164, 168, 200-201). Section 725.835(f) of 1957-1958 Marketing Quota Regulations, 22 F.R. at 4066-4067. The grower could demand a reexamination of his farm if a determination of discount varieties was made; if so, the tests were repeated (Resp. App. 85, 201; Exh. P-16).

The effect of the Department's program, as the court of appeals stated, was "swift and impressive" (Pet. App. 28). Due to the cooperation of all growers, only about one-half percent of the 1957 crop was in the discount varieties, as compared to 40-60 percent the previous year (Resp. App. 110, 114, 118, 139, 219). The renewed confidence of foreign and domestic buyers in the quality of the flue-cured crop was demonstrated by strong buying in the 1957 market at the highest prices ever and an unusually large proportion of export sales, 55 percent of the tobacco sold (Resp. App. 26, 44, 66, 109, 139, 220). At the time of trial, because of these improved market conditions only 3.67 percent of the auction tobacco was entering the price support pool as compared with nearly one-fourth of the crop of the year before (Pet. C.A. App. 34).

B. *The Decisions Below.* In its opinion, the district court first disposed of respondent's motion to dismiss the complaint on the ground, among others, that the court lacked jurisdiction over the Secretary of Agriculture and that it had no jurisdiction to entertain an action for mandamus. While admitting that these jurisdictional points "raised doubts" in his mind, Judge Gilliam denied the motion in the belief that it was "in the public interest to reach a consideration on the merits" (Pet. C.A. App. 23).

On the merits, Judge Gilliam sustained the program against all of the petitioners' contentions. He found that the program had been required to avert the "destructive effect" of the switch to discount tobaccos upon the price support program and the tobacco trade generally (Pet. C.A, App. 24-26). It was established, the court stated, that discount varieties could be distinguished by inspection and chemical analysis and that all aspects of the program complied with the statutory requirements and "were and are being carried out * * * at all levels in a fair and equitable manner" (Pet. C.A. App. 32-33).

On appeal, the Fourth Circuit reviewed the background and implementation of the discount variety program and its "dramatic" restoration of market confidence and stability (Pet. App. 24-28). The court did not, however, reach the merits but disposed of the case on jurisdictional grounds.

The court held, first, that the Secretary was not answerable in the district court in North Carolina since he could be sued only in the District of Columbia (Pet. App. 28). Furthermore, the action could not be maintained against the other defendants since the Secretary of Agriculture was an indispensable party. The court pointed out that the thrust of the action was "in actuality against the Secretary and his administrative regulations" (Pet. App. 30). It was particularly necessary that the Secretary or the United States be made a party since petitioners demanded a doubling of price support payments, which would require a disbursement of funds supplied by the United States (Pet. App. 39).

The court rejected the possibility that it might enjoin the use of distinctive basket tickets, apart from the other regulations. The tickets were only a detail in the

program and the effect of such order would be nullification of the regulations through a return to the chaotic conditions in 1955-1956, a rise in the volume of tobacco entering the stabilization pool and an increased burden on public funds (Pet. App. 31).

Accordingly, the court of appeals directed that the judgment be vacated and the case remanded to be dismissed for lack of jurisdiction, "without any intimation, however, that the merits were not correctly decided by the District Judge" (Pet. App. 31).

ARGUMENT

In holding that the district court was without jurisdiction to entertain an action challenging provisions of the 1957 price support program in the absence of the Secretary of Agriculture, the Fourth Circuit adhered to well established principles. Nevertheless, petitioners now state that they are entitled to relief against the remaining local officials (Pet. 12) and urge as the chief questions presented their contentions on the merits (Pet. 3-5). We submit that further review is not called for since the decision below was clearly correct; there are additional jurisdictional obstacles to the consideration of the instant action; and, in any event, petitioners' claims are entirely without merit.[4]

I.

A. It is well established that the Secretary of Agriculture can be sued in his official capacity only in

[4] In view of the fact that similar provisions for discount varieties will be included in the 1958 tobacco loan program, and presumably in future years, we pass over the fact that the 1957 program challenged in this action has long since been executed. The 1958-1959 Tobacco Marketing Quota Regulations published on June 12, 1958 contain provisions similar to those last year. 23 F.R. 4143, 4144-4147, 4150. See *supra*, pp. 6-7. The 1958 loan program will be published in the near future.

the District of Columbia, his official residence. Absent explicit statutory authorization, no effective service of process can be made within any other federal district and hence no other federal court can obtain jurisdiction over him. *Blackmar* v. *Guerre*, 342 U.S. 512, 516; *Butterworth* v. *Hill*, 114 U.S. 128; *Hunter* v. *United States*, 183 F. 2d 446 (C.A. 4); *Berlinsky* v. *Woods*, 178 F. 2d 265 (C.A. 4), certiorari denied, 339 U.S. 949. Here, the Secretary was clearly an indispensable party to the action. The governing principle, set forth by this Court in *Williams* v. *Fanning*, 332 U.S. 490, is that the Department head is indispensable to the action "if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." 332 U.S. at 493. The tobacco price support program was undertaken under the terms of the Agricultural Act of 1949 which provides that "the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary." Section 401(b), 7 U.S.C. 1421(b). The history of the program shows that the Secretary fully exercised these powers and was responsible for the reduced price support on Coker 139, Coker 140 and Dixie Bright 244, and for the variety identification plan. *Supra*, pp. 5-7; opinion of the district court, Pet. C.A. App. 43.[5]

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[5] The 1957-1958 Marketing Quota Regulations, establishing field identification of discount tobacco and special limited support cards (*supra*, pp. 6-7), were issued by the Acting Secretary of Agriculture. 22 F.R. at 4074. The loan program, specifying one-half support rate and the use of striped basket tickets, was published by the Executive Vice President of the Commodity Credit Corporation. (Continued)

Petitioners have never contested the Secretary's central position in agricultural price support programs. Indeed, their complaint refers throughout to the acts of the Secretary, through his co-defendants and others (Pet. C.A. App. 8, 9, 10, 11, 13, 15, 16). And the complaint explicitly sought relief against "the rules and regulations issued by the defendant, Secretary of Agriculture" (Pet. C.A. App. 12, 15).

Petitioners prayed for an end to the issuance of distinctive marketing cards covering discount varieties, and also for the payment of price support at twice the rates provided in the Department's schedule, equivalent to the rates for the standard varieties (Pet. C.A. App. 15-16). The disruptive impact of such relief is particularly evident with respect to the price support payments sought, which, as the Fourth Circuit noted, "can come only from moneys supplied by the United States" (Pet. App. 30). Price support funds are advanced to the tobacco cooperative associations by Commodity Credit Corporation in the form of nonrecourse loans. Resp. App. 67-68; Section 405 of Agricultural Act of 1949, 7 U.S.C. 1425; Section 464.901 of 1957 Tobacco Loan Program, 22 F.R. at 4777. And the disbursement of these funds as price supports to growers follows a carefully calculated

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22 F.R. at 4779. As the statutes require, Commodity Credit was acting under the direction of the Secretary and fulfilling a program established by him. Section 2 of Commodity Credit Corporation Charter Act, 15 U.S.C. 714; Section 401(a), (b) of Agricultural Act of 1949, 7 U.S.C. 1421 (a), (b).

The district court recognized that, as the record makes clear, the entire program was initiated by the Secretary. Pet. C.A. App. 43. Any other body was a mere "conduit" for the effectuation of the Secretary's decision (*Harris* v. *Bayer*, 18 F.R.D. 392, 393) and the Secretary was, therefore, indispensable to this action (*Williams* v. *Fanning*, 332 U.S. at 493).

schedule. The Department fixes rates each year for more than 150 grades of tobacco, adjusted for the discount varieties and for tied and untied tobacco, so that, considering the estimated crop per grade, the average support price level will be 90 percent of parity—in 1957, 50.8 cents per pound. Resp. App. 90-96, 118-132; Exhs. D-5, D-8. A direction that support prices be increased for the discount varieties might cause the Flue-Cured Association to sustain heavy losses upon sale of the tobacco, which would require additional payments by Commodity, putting the entire program in jeopardy (Pet. C.A. App. 34; Resp. App. 68). The witnesses predicted, and both courts below agreed, that a halt in the identification program would set in motion a repetition of the 1956 situation, market confidence would slump and prices drop, causing the disastrous effect then feared (Pet. App. 31; Pet. C.A. App. 34; Resp. App. 23, 28-29, 44-45, 55-56, 221, 224-225).

Thus, petitioners do not seek merely to correct details of the implementation of price supports, which might conceivably have been committed to local officials. Rather, they would reverse a broad program adopted under the Secretary's authority after deliberation and consultation with tobacco scientists and all branches of the tobacco trade. Such an action cannot be maintained except against the Secretary.[6]

[6] Injunctive suits against subordinate officials restraining official action have been permitted only upon two conditions, neither of which are present here: (1) that the official was unlawfully infringing upon private rights recognized by law; and (2) that an effective order can be made which will expend itself on the subordinate officials, without interfering with the public administration or impinging on the public treasury or domain. *Williams* v. *Fanning*, 332 U.S. at 493-494.

Here, however, the program challenged is not an invasion of private rights but a system of gratuitous benefits provided by Con-

Finally, it may be noted that, even if subordinate officials could be sued, none of the defendant officials here would be appropriate parties in a challenge to the price support and variety identification program. Determinations as to the existence of discount varieties on petitioners' farms were made by the County Agricultural Stabilization and Conservation Committees, as provided in Section 725.835(f) of 1957-1958 Marketing Quota Regulations, 22 F.R. at 4066-4067. Resp. App. 85, 163, 168, 200-201, 209.[7] Yet no county committee is party to this action. Petitioners have joined only the county managers, whose issuance of the blue cards was an automatic, purely ministerial, act following the committee's determination (Section 725.839(b), 22 F.R. at 4069; Resp. App. 209); and the State A.S.C. Committee, which employed the variety specialists (Resp. App. 199-200) but played no other part in the pertinent determination here (Resp. App. 85-86).

B. A further jurisdictional obstacle to the instant action, shown by respondent's motion in the district court and by our brief in the court of appeals, is that the action sought relief in the nature of mandamus, and

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gress. And the relief sought would disrupt the entire administration of tobacco price supports including utilization of public monies.

It should be noted that if the relief prayed would not merely cause eventual disbursement of Government funds, but would directly order such payments, it would constitute an action against the sovereign which would have to be brought against the United States; even joining the Secretary would be insufficient. *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371, 374-375; *Land* v *Dollar*, 330 U.S. 731, 738.

[7] The county committees are bodies elected by delegates of the growers themselves and must be farmers within the county. Section 8(b) of Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590h(b).

hence was beyond the power of the district court. The petitioners sought to compel the Secretary to take action (Pet. C.A. App. 15-16; *supra*, pp. 3, 12) and, in fact, styled the relief sought as "a mandatory order" (Pet. C.A. App. 14). As such, it was entirely beyond the power of the court in which this case was brought, since federal district courts outside the District of Columbia have no jurisdiction to entertain original actions for a writ of mandamus. *Covington & C. Bridge Co. v. Hager*, 203 U.S. 109; *Knapp* v. *Lake Shore Ry. Co.*, 197 U.S. 536; *Rosenbaum* v. *Bauer*, 120 U.S. 450; *Kendall* v. *United States*, 12 Pet. 524; *McIntire* v. *Wood*, 7 Cranch 504. The appellate court below has consistently rejected such attempts to compel the performance of official duties by Government officers. *Updegraff v. Talbott*, 221 F. 2d 342 (C.A. 4); *Hunter* v. *United States*, 183 F. 2d 49 (C.A. 4); *Krug* v. *Fox*, 161 F. 2d 1013, 1019-1020 (C.A. 4); *Branham* v. *Langley*, 139 F. 2d 115 (C.A. 4).

C. Moreover, petitioners had no standing to challenge the provisions of the 1957 price support program. This program imposed no obligations upon petitioners, who are not required to participate in it nor to offer their crop to the cooperative associations or to Commodity. It was not a violation of any rule or regulation to produce and market the discount varieties of tobacco (Resp. App. 111, 112, 208).

Price support benefits are gratuitously provided by Congress as a method of aiding the growers and stabilizing the market, and the action challenged here was the Secretary's exercise of the discretion vested in him by Congress in administering the allocation of these benefits. Since petitioners' expectation that they would

receive a certain level of benefits is not a legally protected interest, the adverse decision of the Secretary, acting wholly within his statutory power (*infra*, pp. 17-21), does not give them standing to sue. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125; *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 478-479; *Benson* v. *Schofield*, 236 F. 2d 719, 722 (C.A.D.C.), certiorari denied, 352 U.S. 976; see *Stark* v. *Wickard*, 321 U.S. 288, 304.

Furthermore, in the 1949 Agricultural Act, under which tobacco price supports are given, Congress plainly barred judicial review. Section 412, 7 U.S.C. 1429, provides that "Determinations made by the Secretary under this Act shall be final and conclusive * * *." Such a finality clause withdraws jurisdiction from the courts (*United States* v. *Babcock*, 250 U.S. 328, 331), and will be enforced without hesitation when it involves a gratuitous benefit that may be qualified or withdrawn by Congress. *Work* v. *Rives*, 267 U.S. 175, 181-182; cf. *Lynch* v. *United States*, 292 U.S. 571, 577; *Dismuke* v. *United States*, 297 U.S. 167, 172.

II

Because of the failure of jurisdiction in this case, the court of appeals did not reach the merits. However, in view of petitioners' presentation of the substantive issues as questions presented (Pet. 3-4), we shall briefly demonstrate that, as the district court held, there is no legal merit or equity to petitioners' case.

A. As the reason for granting the writ of certiorari, petitioners advert only to one of the substantive issues raised in their complaint—that, when the Secretary promulgated the discount variety aspect of the tobacco loan program, he failed to comply with the notice, hearing and referendum provided in the Agricultural

Marketing Agreement Act of 1937, 7 U.S.C. 608c(3), (8), (9); Pet. 10-11. The short answer is, as the district court held (Pet. C.A. App. 35-39), that the tobacco price support program is not an exercise of the Secretary's power under the Marketing Agreement Act but rather under the Agricultural Act of 1949 which authorizes price support for tobacco in Section 101(a), (c), 7 U.S.C. 1441(a), (c). The 1949 Act commits the administration and formulation of price support programs to the discretion of the Secretary and there is no requirement of notice, hearing or referendum. See Sections 401, 412, 7 U.S.C. 1421, 1429.[8]

B. Petitioners contend that, while different support levels may be fixed for the various grades of flue-cured tobacco, no distinction may be made according to varieties. See Pet. C.A. App. 6, 16. However, the statutory authorization is not so limited. Except as otherwise provided, the Secretary is to determine or approve "the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out * * *." Section 401(b) of the Agri-

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[8] The district court suggested a reason for the different procedures in the Agricultural Marketing Agreement Act of 1937 and the Agricultural Act of 1949 (Pet. C.A. App. 36). While price supports do not impose any burden or risk upon growers, orders under the 1937 Act may limit quantities of a commodity to be sold and this severe restriction should not be undertaken without the opportunity for hearing nor without the approval of the trade, except in unusual circumstances.

Similarly, in enacting the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, Congress explicitly excepted from the prescribed rule-making procedures "any matter relating to * * * loans, grants, benefits, or contracts." Section 4. 92 Cong. Rec. 5650. And this exception has always been understood to exempt subsidy programs and loans by such agencies as the Commodity Credit Corporation from the A.P.A. procedures. See Attorney General's Manual on the Administrative Procedure Act (1947), p. 27.

cultural Act of 1949, 7 U.S.C. 1421 (b). And Section 403, 7 U.S.C. 1423, expressly provides:

> Appropriate adjustments may be made in the support price for any commodity for differences in grade, type, staple, quality, location, and other factors. * * *[9]

The Secretary had the power under Section 403 to reduce the price support levels for Coker 139, Coker 140 and Dixie Bright 244 because they were of lower "quality"; furthermore, their lack of flavor and aroma and the disfavor of the current market were clearly among the "other factors" upon which he was authorized to act.

It has always been understood that Section 403 gave the Secretary the widest discretion to consider any relevant factor as the basis for differentials in support levels. When the provisions of Section 403 were first adopted, in 1948, language which appeared to limit this discretion was struck out. See Hearings on Agricultural Act of 1948, Senate Committee on Agriculture

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[9] Section 403 continues:

> * * * Such adjustments shall, so far as practicable, be made in such manner that the average support price for such commodity will, on the basis of the anticipated incidence of such factors, be equal to the level of support determined as provided in this Act. * * *

The evidence in this case established that the price support levels were calculated so that the average support price would equal 50.8 cents per pound, 90 percent of parity for 1957, after taking into consideration adjustments for the various grades, for the estimated crop of discount varieties and for the difference between tied and untied tobacco. This complied with the Act, as the district court held. See *supra*, pp. 12-13; Pet. C.A. App. 40.

and Forestry, 80th Cong., 2d Sess., p. 55.[10] With respect to tobacco there have long been different support levels for tied and untied tobacco, an element which affects cost of handling of the product (Resp. App. 119, 122-123), and in supporting other commodities, the Department has considered differences between varieties, giving reduced support to those determined to be undesirable in the current market.[11]

This wide range of support prices is necessary, as the district court pointed out, since "[w]ithout such 'demand value' differentiation there would be no incentive for the production of better quality, more desirable products." Pet. C.A. App. 40. Furthermore, since the purpose is to stabilize the market, it is entirely appropriate to take over tobaccos at loan rates which bear some relation to their long-range value (Resp.

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[10] The original Senate bill which proposed this section (S. 2318, 80th Cong., 2d Sess.) provided for adjustments "for differences in grade, type, staple, quality, and other factors, *to reflect historical differences in prices based on such factors.*" (Emphasis added.) Secretary of Agriculture Anderson told the Senate Committee that the provision was unnecessary since "these and other price differential factors" were always taken into consideration and "any practical program will continue to take account of them." He further objected to the italicized reference to historical differences, asserting that its emphasis on the past was "unduly confining." A price support operation, he stated, "must take account of conditions that will prevail during the year ahead." Hearings, *supra*.

The criticized portion of the section was dropped and the provision, now Section 403 of the 1949 Act, was adopted as an amendment to Section 302 of the Agricultural Adjustment Act of 1938. Section 202(a) of Agricultural Act of 1948, 62 Stat. 1245, 1254.

[11] Section 446.906(b)(5) of the 1957 Peanut Price Support Program, 22 F.R. at 6552; Section 446.806(b)(4) of the 1956 Peanut Price Support Program, 21 F.R. at 5983, reducing supports for Florispan peanuts. Section 421.2243(c) of 1957 Wheat Price Support Program, 22 F.R. at 2408; Section 421.1643(c), (d)(3) of the 1956 Wheat Price Support Program, 21 F.R. at 4003, 5565-5566, reducing support for more than twenty varieties of wheat.

App. 92, 119). In the instant case, the Secretary's discretion was exercised carefully and reasonably to discourage production of undesirable tobaccos and thereby to avert possible loss of our flue-cured export market, potential collapse of the price support program, and disastrous consequences for the entire trade.[12] Like the decision upon "questions of judgment requiring close analysis and nice choices" in the fixing of tolls, upheld recently (*Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318), the Secretary's allocation of price supports should not disturbed.

The Secretary's discretion was, in effect, reviewed and sustained by Congress last year. After the 1957 tobacco price support program was announced, Senator Johnston introduced Senate Bill 382 which would have amended Section 403 of the 1949 Act to bar the variety portion of the program by adding the following sentence:

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[12] Moreover, recognizing that many growers planted the discount varieties unintentionally last year, special provision was made in the 1957 program to minimize the loss to them from the reduction in price supports (Resp. App. 88):

Two special pools were set up by the Stabilization Corporation to handle the 4.5 million pounds of discount tobacco which came under price support—one for tobacco composed of less than one-third discount, a second for the remainder. This is being separately packed and merchandised in an effort to realize as much as possible, and the entire return above the support loan and actual cost of handling will be distributed to the growers as soon as possible (Resp. App. 51-52, 88-89, 114, 116-117, 228). Ordinarily, the growers get only one-half of the excess return and distribution is delayed until all the year's crop is disposed of (Resp. App. 51; Section 464.906(a)-(c) of 1957 Tobacco Loan Program, 22 F.R. at 4778).

Approximately two-thirds of this tobacco has been sold. Until the pools are entirely liquidated by the Stabilization Corporation, it will be impossible to determine what loss, if any, will be sustained by the petitioners.

> * * * Notwithstanding the foregoing provisions of this section, no such adjustments shall be made in the support price of tobacco for differences in variety.

The bill died in committee after hearings were held upon it. Hearings on S. 382, Support Price for Tobacco, Senate Committee on Agriculture and Forestry, 85th Cong., 1st Sess. (1957).

C. Petitioners' other contentions may be briefly answered. First, the use of a striped basket ticket for discount variety tobacco is not precluded by the Tobacco Inspection Act, 7 U.S.C. 511, *et seq.* It does not conflict with any of the grading information provided by that Act but simply adds to the ticket an additional symbol, wholly for price support purposes, and authorized under the Agricultural Act of 1949 (Pet. C.A. App. 41-42).

Furthermore, the antitrust laws do not constitute an obstacle to the variety identification program, since the specific authority of a federal regulatory act suffices to exclude such official action from the scope of antitrust policy. See *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 91-93; *Parker* v. *Brown*, 317 U.S. 341, 350-352; *United States* v. *Borden Co.*, 308 U.S. 188, 201-202; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 558, 560; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 193 F. 2d 230, 234-235 (C.A.D.C.), affirmed, 343 U.S. 414. This allegation comes with poor grace from the petitioners for, as the district court found, the relief sought here would enable them to engage in one of the oldest forms of unfair trade practices and pass their

product off as one of the more desirable standard varieties of tobacco (Pet. C.A. App. 33, 42, 44).

And, finally, there is no basis for the contention that the Secretary's administration of the agricultural price support program deprived petitioners of property without due process of law. Restrictive regulation in the agricultural field has been sustained (*e.g.*, *Mulford* v. *Smith*, 307 U.S. 38, 49-51; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 148-151); a discretionary distribution of price support benefits is valid *a fortiori*.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JULY, 1958.

APPENDIX

The pertinent provisions of the Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U.S.C. 1421, *et seq.*, are as follows:

Section 101 (7 U.S.C. 1441).

The Secretary of Agriculture (hereinafter called the "Secretary") is authorized and directed to make available through loans, purchases, or other operations, price support to cooperators for any crop of any basic agricultural commodity, if producers have not disapproved marketing quotas for such crop, at a level not in excess of 90 per centum of the parity price of the commodity nor less than the level provided in subsections (a), (b), and (c) as follows:

* * * * *

(c) For tobacco, if marketing quotas are in effect, the level of support shall be 90 per centum of the parity price.

* * * * *

Section 401 (7 U.S.C. 1421).

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. * * *

Section 403 (7 U.S.C. 1423).

Appropriate adjustments may be made in the support price for any commodity for differences in grade, type, staple, quality, location, and other factors. Such adjustments shall, so far as practicable, be made in such manner that the average support price for such commodity will, on the basis of the anticipated incidence of such factors, be equal to the level of support determined as provided in this Act. * * *

Section 405 (7 U.S.C. 1425).

No producer shall be personally liable for any deficiency arising from the sale of the collateral securing any loan made under authority of this Act unless such loan was obtained through fraudulent representations by the producer. This provision shall not, however, be construed to prevent the Commodity Credit Corporation or the Secretary from requiring producers to assume liability for deficiences in the grade, quality, or quantity of commodities stored on the farm or delivered by them, for failure properly to care for and preserve commodities, or for failure or refusal to deliver commodities in accordance with the requirements of the program.

Section 412 (7 U.S.C. 1429).

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 104

QUENTIN STROUD, ET AL.,

Petitioners,

vs.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Statement

The identification of tobacco upon a variety basis under the challenged rules and regulations was done by persons referred to as "specialists" who had had three days training (Pet. C.A. Rep. App. 43); (Resp. C.A. App. 84). Cultural practices, seasons and soil textures influence the chemical analysis of tobacco (Pet. A.A. App. 85). Tobacco produced from the same seed bed and transplanted

to different fields, was identified as different varieties. (Pet. C.A. App. 65-66).

The varieties Coker 139, 140 and Dixie Bright 244, can be identified during the progress of auction sales (Resp. A.A. App. 215), (Pet. C.A. Resp. App. 66). Coker 139, when it was on the market in major production, led all other varieties in average sale price. (Pet. C.A. App. 57-58). There is no known way to determine flavor and aroma other than smoking the tobacco (Resp. C.A. App. 135-136).

Tobacco manufacturers and dealers have followed the practice of chemically analyzing tobacco prior to the auction sale season for several years. (Pet. C.A. App. 76). The quantity of tobacco obtained as samples for use in chemical analysis is insufficient to accurately determine the chemical content of a field of tobacco. (Pet. C.A. App. 89, 91).

The challenged regulations referred to varieties "Coker 139, 140 and Dixie Bright 244" (Pet. Ex. 4; Pet. C.A. Brief, 67). Until June 11, 1957, when the so-called discount varieties were defined as "Coker 139, Coker 140 or Dixie Bright 244, or any mixture or strain of such seed varieties * * *, growth characteristics similar to the varieties of flue-cured tobacco designated as Coker 139, Coker 140 or Dixie Bright 244 or a mixture or strain of such seed varieties". This enlarged the area of identification. (Pet. C.A. App. 83). The determination as to varieties was ex parte. (Pet. C.A. Brief, Ex. F. 7, 8, 10). The regulations were adopted too late in the crop year for Petitioners to produce other varieties of tobacco and after 60 per cent of the crop expense had been incurred. (Pet C.A. Rep. App. 52-53).

Prior to the 1957 auction sale season basket tickets showed only the pounds and the grade, no indication of the type card held by the producer (Resp. C.A. App. 53).

The presence of the striped card removed the tobacco from auction sale Resp. C.A. App. 50, 54). Tobacco companies for centuries prior to 1958 exercised their own judgment in the purchase of tobacco, including auction markets, (Resp. C. A. App. 64-65).

A. The validity of the 1957 Tobacco Loan Program and Variety Identification Regulations is not to be determined upon the condition of the foreign tobacco trade status or the benefits which might result from their enforcement.

Argument

I

A. The Petitioners concede that the Secretary of Agriculture is not before the Court unless his participation in the trial of the case upon its merits and his failure to appeal from the decree of the Court dc ying his motion to dismiss brings him in Court and estops him from now challenging Petitioners' contention that he is before the Court.

The Secretary of Agriculture is not an indispensable party to this action. *U. S.* v. *American Railway Corporation*, 265 U.S. 435, in which the Court stated:

> "It is true that a party who does not appeal from a final decree of the trial Court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party".

Williams v. *Fanning*, 332 U. S. 490 (493), in which the Court states:

> "These cases evolve the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him, or by having a subordinate exercise it for him",

and further:

> "That result followed 268 U. S. 230 by analogy to those cases which permit suit against a public official who invades a private right either by exceeding his authority as by carrying out a mandate of his superior".

92 A. L. R. 1582, et seq. (Anno.), states:

> "We agree at once that the Secretary, not being before the Court, could not be enjoined from enforcing his regulations. . . . But if those regulations are indeed invalid, the control committee cannot shield themselves behind the Secretary, or compel compliance therewith in his name".

U. S. v. *Cox*, 9 L. Ed. 671.
Yarnell v. *Hillsboro Pacing Company*, 70 Fed. 2d 435.
Crenich v. *Rutter*, 265 U. S. 388.
Webster v. *Fall*, 266 U. S. 507.
Colorado v. *Tull*, 268 U. S. 225.

The annotation further states:

> "It follows that the Secretary was not an indispensable party".

Garfield v. *U. S.*, 211 U. S. 240 (260) (Quotation, Pet. C. A. Brief 30-31).
National Labor Relations Board v. *Express Publishing Company*, 312 U.S. 426 (Quotation, Pet. C. A. Brief, 32).

Petitioners have challenged the validity of the regulations through which tobacco was and is being identified upon a variety basis, and the varieties classed as undesirable supported at 50 per cent of parity. *Title 7 USCA, 1441*, (App.

Resp. Brief, 23) authorizes and directs the Secretary of Agriculture "to make available through loans, purchases, or other operations, price support to cooperators for any crop of any basic agricultural commodity if producers have not disapproved marketing quotas for such crops, at a level not in excess of ninety per centum of the parity price of the commodity nor less than the level provided in subsections (a), (b), and (c), as follows: * * *

> (c) For tobacco, if marketing quotas are in effect, the level of support shall be 90 per centum of the parity price".

B. The Petitioners seek the benefits to which they are entitled under the program unaffected by the challenged regulations which they contend are void. They are entitled to have the parties who are before the Court restrained from enforcing the void regulations. *Champion Refining Company* v. *Corporation Commission,* 286 U. S. 210, (Quotation, Pet. C. A. Brief, 31).

C. Petitioners are within quota producers and cooperators within the meaning of *7 USCA, 1441,* and entitled to have their tobacco supported at 90 per cent of parity. No market for their crops was or is available to them other than the auction sale market. They have earned the right to have their tobacco supported at 90 per cent of parity by complying with all regulations of the Secretary of Agriculture. The regulations which they have approved are agreements with the United States Government and as such they are entitled to have the Government comply with the terms and provisions of the agreement which includes 90 per cent of parity for their tobacco. *Stark* v. *Wickard,* 321 U. S. 288 (303), in which the Court states:

> "The statute and orders create a right in the producer to avail himself of the protection of a minimum price

> afforded by Government action. Such a right created by statute is mandatory in character and obviously capable of judicial enforcement":

and further, (304):

> "Under such circumstances we think the producers have legal standing to object to illegal provisions of the orders";

and further, (306):

> "When, as we have previously concluded in this opinion, definite personal rights are created by Federal statute similar in kind to those customarily treated in Courts of law; the silence of Congress as to judicial review is, at any rate, in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the Federal Courts in the exercise of their general jurisdiction; when Congress passes an act empowering administrative agencies to carry on governmental activities the power of those agencies is circumscribed by the authority granted".

If the 1949 Agricultural Act which in fact was an Amendment to the Agricultural Adjustment Act, vests in the Secretary of Agriculture the powers claimed by the defendants in this action, it is unconstitutional and void.

U. S. v. *Butler*, 297 U. S. 1.

II.

A. The Marketing Agreement Act and the Act referred to by defendants as "Agricultural Act of 1949" are in pari materia. Orders and regulations when approved by referendum by the producers become agreements. *Title 7 USCA 515 and 608b.* Compliance by producers with all the regu-

lations relating to the production of a crop within the purview of the Acts qualifies them as cooperators. One of the rights under the agreement is 90 per cent of parity, which right they are privileged to enforce through the courts. *Lynch* v. *U. S.*, 292 U. S. 571 (579), the Court stated:

> "The Fifth Amendment commands that property be not taken without just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment * * *. When the United States enters into contract relations, etc., rights and duties therein are governed generally by the law applicable to contracts between private individuals".

The Secretary of Agriculture does not have the right to deny to the Petitioners 90 per cent of parity and all other rights accruing to them under the terms of their agreement with the United States. In the case of *Desmiecker* v. *U. S.*, 297 U. S. 167 (172), the Court stated:

> "But the power of the administrative officer will not in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled".

B. Title 7 USCA, Chapters 21A—Tobacco Inspection; 21B—Tobacco Control; Chapter 26—Agricultural Adjustment; Chapter 35—Agricultural Adjustment Act of 1938; Chapter 35A—Price Support of agricultural commodities, as amended, defines tobacco as follows:

> Sec. 511: "Tobacco means tobacco in its unmanufactured form".

Sec. 515a: "Kind of tobacco means one or more types of tobacco as classified in Service and Regulatory Announcement numbered 118 of the Bureau of Agricultural Economics of the United States Department of Agriculture as listed below according to the name or names by which known:

Types 11, 12, 13, and 14 known as flue-cured tobacco".

The Secretary has no discretion in the administration of the Act.

U. S. v. *Rock Royal Co-Op.*, 307 U. S. 533, the Court states:

"The Secretary is not permitted freedom of choice as to the commodities he may attempt to aid by an order." "He is limited to the procedures prescribed by the Acts."

U. S. v. *Babcock*, 250 U. S. 328 (331), the Court stated:

"That where a statute creates a right and provides a special remedy, that remedy is exclusive".

Parker v. *Brown*, 317 U. S. 341 (352), the Court states:

"The statute itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions".

The rules and regulations being enforced by the defendants are not agreements and are in violation of the anti-trust laws, resulting in irreparable injury and damage to Petitioners and entitling them to the relief sought.

U. S. v. *Borden Company*, 308 U. S. 188 (199); in which the Court states:

> "The statutory program to be followed under the Agricultural Act requires the participation of the Secretary of Agriculture who is to hold hearings and make findings * * *. The methods which the Agricultural Act permits to obtain that result are two-fold, marketing agreements and orders. To give validity to marketing agreements, the Secretary must be an actual party to the agreement * * * As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched";

and further (201):

> "If Congress had desired to grant any further immunity, Congress doubtless would have said so".

Alabama Power Company v. *Ickes*, 302 U. S. 464 (467-468), the Court stated:

> "Public officials owe a duty to refrain from interfering with the property or business of the plaintiffs and from injuring them therein without authority or in abuse of it. When an Act, in violation of this duty will be the proximate cause of consequences to the plaintiff so substantial and onerous as to be comparable to injustices which the law is accustomed to note as legal damage, a cause of action arises with the right to an injunction".

Petitioners have brought themselves well within the principles embodied in the statutes and decisions cited, entitling them to have writ of certiorari granted to the end that the relief sought may be made available to them, and that justice may prevail.

Respectfully submitted,

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